

Mar 23, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SUNSHINE MENDOZA,
o/b/o J.J.M., a minor child,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

No. 4:16-CV-05151-EFS

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
SUMMARY JUDGMENT MOTION AND
DENYING DEFENDANT'S SUMMARY
JUDGMENT MOTION**

CLERK'S OFFICE ACTION REQUIRED

Before the Court are the parties' cross motions for summary judgment, ECF Nos. 13 & 22. Plaintiff J.J.M. appeals a denial of benefits by the Administrative Law Judge (ALJ).¹ The Commissioner of Social Security (Commissioner) asks the Court to affirm the ALJ's decision finding Plaintiff not disabled. ECF No. 22.

After reviewing the record and relevant authority, the Court is fully informed. For the reasons set forth below, the Court grants in part and denies in part Plaintiff's Motion for Summary Judgment, denies Defendant's Motion for Summary Judgment, and remands this case to the ALJ for additional proceedings.

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¹ Sunshine Mendoza is seeking benefits on behalf of her minor child, J.J.M. In this Order, the Court refers to J.J.M. as "Plaintiff."

1 **I. PROCEDURAL HISTORY²**

2 Plaintiff was born on November 3, 2008. Administrative Record (AR)
3 177. On March 29, 2012, Plaintiff's mother protectively filed an
4 application for supplemental security income on Plaintiff's behalf,
5 alleging that he was disabled due to being born without a left ear and
6 having speech problems, with an onset date of November 3, 2008. AR 177,
7 183. The application was denied initially and upon reconsideration, and
8 Plaintiff requested a hearing. AR 105, 111, 116.

9 After a hearing before Administrative Law Judge (ALJ) Moira Ausems
10 on October 20, 2014, the ALJ published a decision denying Plaintiff's
11 disability claim. AR 42, 48. On September 16, 2016, the Appeals Council
12 denied Plaintiff's request for review, rendering the ALJ's decision as
13 final agency action for the purposes of judicial review. AR 1. On
14 November 17, 2016, Plaintiff filed this lawsuit, appealing the ALJ's
15 decision. ECF No. 1. The parties subsequently filed the instant summary
16 judgment motions. ECF Nos. 13 & 21.

17 **II. THREE-STEP PROCESS FOR CHILD DISABILITY**

18 A child under the age of 18 is disabled within the meaning of the
19 Social Security Act "if that individual has a medically determinable
20 physical or mental impairment, which results in marked and severe
21 functional limitations, and which can be expected to result in death
22 or which has lasted or can be expected to last for a continuous period
23 of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(i); see also
24 20 C.F.R. § 416.906. The regulations provide a three-step process to

25 ² The facts are only briefly summarized. Detailed facts are contained in the
26 administrative hearing transcript, the ALJ's decision, the parties' briefs,
and the underlying records.

determine whether a claimant satisfies this criteria. 20 C.F.R. § 416.924(a). First, the ALJ must determine whether the child is engaged in substantial gainful activity. 20 C.F.R. § 416.924(b). Second, the ALJ considers whether the child has a "medically determinable impairment that is severe," which is defined as an impairment that causes "more than minimal functional limitations." 20 C.F.R. § 416.924(c). Third, if the ALJ finds a severe impairment, the ALJ must then consider whether the impairment either "medically equals" or "functionally equals" a listed disability. 20 C.F.R. § 416.924(c), (d).

At the third step, if the ALJ finds that the child's impairment or combination of impairments does not meet or medically equal a listing, the ALJ must still determine whether the impairment or combination of impairments functionally equals a listing. 20 C.F.R. § 416.926a(a). The ALJ's functional equivalence assessment requires the ALJ to evaluate the child's functioning in six "domains." These six domains are designed "to capture all of what a child can or cannot do," and are as follows:

- (1) Acquiring and using information;
- (2) Attending and completing tasks;
- (3) Interacting and relating with others;
- (4) Moving about and manipulating objects;
- (5) Caring for self; and
- (6) Health and physical well-being.

20 C.F.R. § 416.926a(b)(1)(i)-(vi).

A child's impairment will be deemed to functionally equal a listed impairment if his condition results in "marked" limitations in at least

1 two domains, or an "extreme" limitation in at least one domain. 20
2 C.F.R. § 416.926a(a). A "marked limitation" is present in a domain if
3 the child's impairment "interferes seriously with [his] ability to
4 independently initiate, sustain, or complete activities." 20 C.F.R. §
5 416.926a(e)(2)(i). By contrast, an "extreme limitation" is defined as
6 a limitation that "interferes very seriously with [his] ability to
7 independently initiate, sustain, or complete activities." 20 C.F.R. §
8 416.926a(e)(3)(i).

9 **III. ALJ'S DECISION**

10 At the first step in this case, the ALJ determined that Plaintiff
11 has not engaged in substantial gainful activity since applying for
12 disability. AR 26. At the second step, the ALJ found that Plaintiff
13 "has the following severe impairments: left ear conductive hearing
14 loss; congenital absence of left ear due to grade 3 microtia with
15 complete canal atresia; and speech and language delays." AR 26. And,
16 at the third step, the ALJ found that Plaintiff "does not have an
17 impairment or combination of impairments that meets or medically equals
18 the severity of one of the listed impairments," not did any impairments
19 "functionally equal" the severity of a listed impairment. AR 27-28.
20 Accordingly, the ALJ found that Plaintiff was not disabled for the
21 purposes of the Social Security Act. AR 42.

22 While considering Plaintiff's disability claim, the ALJ
23 considered evidence in the record, including objective medical
24 evidence, medical opinions of evaluating and treating physicians, and
25 the testimony of Sunshine Mendoza, Plaintiff's mother. See AR 29. The
26 ALJ found that although Plaintiff suffered from medically determinable

1 impairments that could reasonably be expected to produce the alleged
2 symptoms, Ms. Mendoza's "statements concerning the intensity,
3 persistence and limiting effects of these symptoms are not entirely
4 credible" AR 29. The ALJ also gave "little weight" to the
5 opinion of Dr. Michael Olds, Plaintiff's treating physician and
6 otologist, because he "did not give more than a cursory explanation
7 for a couple of findings and omitted explanations of others." AR 33.

8 However, the ALJ gave "substantial weight," to the opinions of
9 Social Security Administration (SSA) reviewing physicians because their
10 "findings are consistent with subsequent medical records and non-
11 medical evidence." AR 28, 30-32. The ALJ came to a similar conclusion
12 as the SSA evaluators for the six functional-equivalence domains,
13 finding that Plaintiff has (1) a less than marked limitation in
14 acquiring and using information; (2) a less than marked limitation in
15 attending and completing tasks; (3) a marked limitation in interacting
16 and relating with others; (4) no limitation in moving about and
17 manipulating objects; (5) a less than marked limitation in caring for
18 self; and (6) a less than marked limitation in health and physical
19 well-being. AR 34-42.

20 IV. STANDARD OF REVIEW

21 This Court will reverse an ALJ's decision only if it was not
22 supported by substantial evidence in the record as a whole or if the
23 ALJ applied the wrong legal standard. *Molina v. Astrue*, 674 F.3d 1104,
24 1110 (9th Cir. 2012). Substantial evidence is "more than a mere
25 scintilla but less than a preponderance; it is such relevant evidence
26 as a reasonable mind might accept as adequate to support a conclusion."

1 *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012) (quoting *Sandgate*
2 *v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

3 It is the role of the ALJ, not this Court, to weigh conflicting
4 evidence and make credibility assessments. If the evidence supports more
5 than one rational interpretation, the Court may not substitute its
6 judgment for that of the ALJ. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th
7 Cir. 1999). The Court will also uphold "such inferences and conclusions
8 as the [ALJ] may reasonably draw from the evidence." *Mark v. Celebrezze*,
9 348 F.2d 289, 293 (9th Cir. 1965). However, if the ALJ applied an
10 incorrect legal standard in weighing the evidence and arriving at his
11 decision, the Court will reverse unless the error was harmless. See
12 *Molina*, 674 F.3d at 1111.

13 V. ANALYSIS

14 Plaintiff seeks judicial review of the Commissioner's final
15 decision denying him benefits. He contends that the ALJ reversibly
16 erred by (A) failing to obtain an appropriate specialist assessment;
17 (B) improperly weighing the evidence; and (C) improperly assessing the
18 functional equivalence domains. See ECF No. 11.

19 A. Case review by a qualified specialist

20 Section 1382c(a)(3)(I) of the Social Security Act provides:

21 In making any determination under this title . . . with
22 respect to the disability of an individual who has not
23 attained the age of 18 years . . . the Commissioner of Social
24 Security shall make reasonable efforts to ensure that a
25 qualified pediatrician or other individual who specializes
26 in a field of medicine appropriate to the disability of the
individual (as determined by the Commissioner of Social
Security) evaluates the case of such individual.

42 U.S.C. § 1382c(a)(3)(I).

1 The Court of Appeals for the Ninth Circuit has interpreted this
2 provision to mean that "the ALJ is required to make a reasonable effort
3 to obtain a case evaluation, based on the record in its entirety, from
4 a pediatrician or other appropriate specialist, rather than simply
5 constructing his own case evaluation from the evidence in the record."
6 *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1014 (9th Cir. 2003).

7 After the Ninth Circuit decided *Howard ex Rel. Wolff*, the Social
8 Security Administration issued Social Security Acquiescence Ruling 04-
9 01(9) in response, which included the following:

10 To satisfy this requirement, the ALJ or AAJ may rely on [a]
11 case evaluation made by a State agency medical or
12 psychological consultant that is already in the record, or
13 the ALJ or AAJ may rely on the testimony of a medical expert.
14 When the ALJ relies on the case evaluation made by a State
15 agency medical or psychological consultant, *the record must*
16 *include the evidence of the qualifications of the State*
17 *agency medical or psychological consultant.* In any case,
18 the ALJ or AAJ must ensure that the decision explains how
19 the State agency medical or psychological consultant's
20 evaluation was considered.

21 AR 04-1(9) at *3, 2004 WL 5846720, 69 FR 22578-03 (S.S.A. Apr. 26, 2004)
22 (emphasis added).

23 Here, the hearing testimony of psychiatrist Joseph Cools, Ph.D.,
24 does not constitute a case evaluation from an individual who
25 "specializes in the field of medicine appropriate to the disability of
26 the individual." 42 U.S.C. § 1382c(a)(3)(I). Dr. Cools repeatedly
expressed that he was unable to render an opinion as to most of the
record because it was "outside of [his] area of expertise." AR 59. He
commented that he looked "at the record the same as [the ALJ] and
counsel" because he did not "have the expertise to really tease out the
grave impairments" and that "it's really not my area." AR 60-61. While

1 Dr. Cools noted that the record did not indicate Plaintiff had a severe
2 psychological pathology, he said that "it would really take a
3 pediatrician or a speech pathologist to say whether or not" Plaintiff
4 had any marked limitations in functional-equivalence domains 1 and 2.
5 AR 60-61. Even the ALJ commented at the hearing that she was covering
6 a docket for another ALJ, and that she was "not really sure" why a
7 clinical psychologist was called as an expert witness. She suggested
8 that she might conduct interrogatories with an audiologist or other
9 specialist after the hearing but never did so. AR 62.

10 Instead, the ALJ relied on three case evaluations from Social
11 Security Administration evaluators: Dr. Christy Ulleland, who prepared
12 a report on June 26, 2012, see AR 90; Dr. Nevine Makari, who prepared
13 a report on January 28, 2013, see AR 101; and Dr. William Lysak, who
14 prepared a report for Plaintiff's previous disability claim on May 10,
15 2010, see AR 268. AR 28, 30-32. Each report includes a notation of
16 "M.D." or "Ph.D." next to the evaluator's name, but no other evidence
17 of their qualifications exists in the record. The fact that these
18 doctors were Social Security evaluators strongly suggests that each was
19 fully qualified to conduct a case review. Nevertheless, the record
20 contains no actual evidence of the doctors' qualifications as required
21 by AR 04-1(9).

22 Accordingly, the Court remands this matter for the ALJ to properly
23 include such qualifications in the record or, preferably, to obtain a
24 new case evaluation by an appropriate medical specialist. See 42 U.S.C.
25 § 1382c(a)(3)(I); AR 04-1(9) at 3.

26 /

1 **B. ALJ's weighing of the evidence and assessment of the functional-**
2 **equivalence domains**

3 Because the Court is remanding this matter to the ALJ for further
4 proceedings, it declines to address Plaintiff's arguments regarding the
5 ALJ's weighing of the medical evidence and the testimony of Plaintiff's
6 mother. Similarly, the Court declines to address the ALJ's evaluations
7 of the six functional-equivalence domains. The Court encourages the ALJ
8 to re-evaluate the medical evidence, Ms. Mendoza's testimony, and the
9 domains in light of any developments on remand.³

10 **C. Remand vs. award of benefits**

11 Plaintiff urges the Court to reverse for an immediate award of
12 benefits. The decision whether to remand for further proceedings or
13 reverse and award benefits is within the discretion of the Court. See
14 *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An immediate
15 award of benefits is appropriate where "no useful purpose would be
16 served by further administrative proceedings, or where the record has
17 been thoroughly developed," *Varney v. Sec'y of Health & Human Servs.*,
18 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand
19 would be "unduly burdensome." *Terry v. Sullivan*, 903 F.2d 1273, 1280
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21
22 ³ The record also contains evidence suggesting that Plaintiff's limitations
23 had significantly improved by October 2014, which the ALJ used to justify a
24 finding of no disability. AR 28. Even if Plaintiff's condition has improved to
25 the point where he is not presently disabled, the ALJ's opinion did not address
26 the possibility that he was disabled - and thus eligible for benefits - in the
past. Plaintiff may still be entitled to benefits for a past "closed period"
of disability, provided he was disabled for at least twelve months. See
generally Attmore v. Colvin, 827 F.3d 872 (9th Cir. 2016); 42 U.S.C.
§ 1382c(a)(3)(C)(i) (a minor is disabled if he experiences a "physical or
mental impairment . . . which has lasted or can be expected to last for a
continuous period of not less than 12 months").

1 (9th Cir. 1990). This policy is based on the "need to expedite disability
2 claims." *Varney*, 859 F.2d at 1401. But where there are outstanding
3 issues that must be resolved before a determination can be made, and it
4 is not clear from the record that the ALJ would be required to find a
5 claimant disabled if all the evidence were properly evaluated, remand
6 is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir.
7 2004).

8 Here, the Court is remanding for additional proceedings due to the
9 ALJ's failure to obtain an evaluation from a relevant specialist or
10 comply with AR 04-1(9). That being the case, it cannot be said that "no
11 useful purpose would be served by future administrative proceedings."
12 *Varney*, 859 F.2d at 1399. Accordingly, the Court declines to remand for
13 the immediate award of benefits.

14 VI. CONCLUSION

15 For the reasons discussed above, the Court reverses the decision
16 of the ALJ and remands for further proceedings. On remand, the ALJ
17 should "obtain a case evaluation, based on the record in its entirety,
18 from a pediatrician or other appropriate specialist." *Howard*, 341 F.3d
19 at 1014; *see also* 42 U.S.C. 1382c(a)(3)(I). If the ALJ relies on the
20 opinions of any Social Security Administration evaluators, she shall
21 ensure that the record contains each evaluator's qualifications and
22 explain how each evaluation was considered.⁴ *See* AR 04-1(9).

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24
25 ⁴ Arguably, the ALJ could satisfy this requirement by simply adding the
26 qualifications of the SSA evaluators to the record. The Court notes, however,
that the latest evaluation – performed by Dr. Makari on January 28, 2013,
see AR 101 – is now five years old. The Court therefore encourages the ALJ
to obtain a new case evaluation from a qualified specialist.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED IN PART AND DENIED IN PART**; this matter is **REMANDED** to the agency for further proceedings consistent with this Order.

2. The Commissioner's Motion for Summary Judgment, **ECF No. 21**, is **DENIED**.

3. The Clerk's Office is to enter **JUDGMENT** in favor of Plaintiff.

4. The case shall be **CLOSED**.

IT IS SO ORDERED. The Clerk's Office is directed to file this Order, enter Judgment for the Plaintiff, provide copies to all counsel, and close the file.

DATED this 23rd day of March 2018.

 s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge